86-2033

No. A-766

IN THE

SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1987

ALBERT J. MOLINARI,

Petitioner

v.

MCNEIL PHARMACEUTICAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the standard set forth in 29 C.F.R. 541.315(a) delineating $250 per week as a high salary indicative of professional status is irrational when used to determine whether, pursuant to 29 U.S.C. § 213 (a)(1), an employee is a "professional", and thus exempt from overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*.

2. Whether a district court is bound to apply the criteria enunciated in 29 C.F.R. 541.315(a) in determining whether an employee is an exempt professional under 29 U.S.C. § 213(a)(1).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Albert J. Molinari respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 30, 1987.

OPINION BELOW

No opinion was rendered by the Court of Appeals. The opinion of the District Court for the Eastern District of Pennsylvania, *Molinari v. McNeil Pharmaceutical*, 27 WH Cases 1236 (E.D.Pa. 1986), appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 30, 1987. A timely Motion for an Extension of Time was filed with this Court on April 17, 1987

and granted on April 21, 1987. A second Motion for an Extension of Time was filed with this Court on June 5, 1987 and granted on June 10, 1987. This Court's jurisdiction is invoked under 29 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 29:

Section 213(a) *Minimum wage and maximum hour requirements*

> The provisions of section 206 . . . and section 207 of this title shall not apply with respect to —
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . .

STATEMENT OF THE CASE

Albert Molinari, the plaintiff in this proceeding and the petitioner herein, was employed by McNeil Pharmaceutical (hereinafter, "McNeil") continuously from August 2, 1971 until April 19, 1983. On July 1, 1975, he became a Research Associate in the Chemical Division and on January 1, 1981, he was promoted to Senior Research Associate in Chemical and Pharmaceutical Development. He continued in the latter position until his termination. As a senior research associate, slightly less than half petitioner's work was devoted to running experiments. His supervisor determined the variables petitioner was to run and the conditions under which they were to be run. Petitioner's other work included recording and summarizing raw data, meeting with his supervisor and screening journals assigned to him. His weekly salary ranged from $395 in 1979 to $567 in 1983. Petitioner Molinari worked substantial overtime on a regular basis for which he was entitled to overtime pay on the basis of contract and statute. He was not paid for the overtime work.

Following his termination, petitioner brought an action in district court against McNeil alleging McNeil's failure to comply with the requirements of the Fair Labor Standards Act (hereinafter, FLSA), 29 U.S.C. § 201 *et seq*. and seeking to recover his overtime pay. On May 21, 1986, the district court found that

petitioner was employed by McNeil as a chemist and that he was a "professional", exempt from the overtime provisions of the FLSA. On that basis the court granted Defendant McNeil's motion for summary judgment.

Petitioner appealed to the United States Court of Appeals for the Third Circuit. On January 30, 1987, the Court of Appeals issued a short form affirmance of the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision below raises a significant and recurring problem concerning the effect of an administrative agency's failure to promulgate updated regulations.

Section 213(a)(1) of Title 29 exempts certain employees, including professionals, from the overtime and minimum wage provisions of the Fair Labor Standards Act. The district court's determination that petitioner was an exempt "professional" was based upon the court's application of criteria set forth in 29 C.F.R. § 541.315.[1] The threshold question is whether an employee is "high salaried" and therefore presumptively a professional. If so, the employee's status is examined with reference to the criteria set forth in 29 C.F.R. § 541.315. Under the regulation, a weekly salary of $250 is a high salary and its recipient is presumptively a professional.

The provision setting $250 per week as the parameter over which an employee was to be considered high salaried was established in 1975. The regulation anticipated an upward revision of salary standard in 1981 and again in 1983. However, these revisions were postponed indefinitely by a Presidential Memorandum, 46 FR 11227, Feb. 6, 1981.

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1. If an employee is not "high salaried", then a determination of the employee's status is based on a different set of criteria set forth in 29 C.F.R. § 541.3.

In 1975, when the Department of Labor promulgated 29 C.F.R. § 541.315, $250 per week was substantially more than that earned by production workers in manufacturing whose average weekly earnings were $190.79. Monthly Labor Review, December, 1979, p. 77, Current Labor Statistics: Establishment Data, Table No. 14 *Hours and Earnings, By Industry Division, 1947-78*. In 1983, average weekly wages for production workers in manufacturing non-durable goods (chemicals and allied products) was $440.54. Monthly Labor Review, December, 1984, p. 69, Current Labor Statistics: Establishment Data, Table No. 16 *Average Hours and Earnings, By Industry 1968-83*. Thus, the significance of a weekly income of $250 in 1975 was dramatically different than the same salary in 1983, by which time the average weekly wage for production workers had more than doubled. The continued application of the 1975 standard to 1983 salaries is not rationally related to the purposes of § 213(a), i.e., the exclusion of highly paid professionals from the overtime provisions of the FLSA.

Although this petition involves the claim of a single individual who brought suit pursuant to 29 U.S.C. § 216(b), other claimants seek redress through the Department of Labor, pursuant to 29 U.S.C. § 216(c). The Department of Labor, acting on the basis of its anachronistic standard setting $250 a week as "high salaried", must deprive claimants of an appropriate review of their claims. Thus, the application of an outdated and inappropriate standard affects not only individual plaintiffs in civil actions, but also the operation of the Department of Labor with regard to the implementation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. Claims brought under 29 U.S.C. § 216(c) may be determined in an administrative setting and would not come before a court for review. The FLSA contemplates enforcement primarily through administrative action. This Court's determination of the applicability of a salary standard set in 1975 to a 1983 salary would have significant impact on the implementation of the FLSA by the Department of Labor.

This significant regulatory issue justifies the grant of certiorari to review the judgment below.

2. The Decision Below Ignores Criteria Established in Regulations Promulgated by the Department of Labor and Conflicts With the Regulatory Scheme.

Determining professional status, pursuant to 29 C.F.R. 541.315(a), involves three general criteria: (1) the employee receives a high salary or fees; (2) the employee's occupation is learned or artistic; (3) the employee's primary duties consist of the performance of work requiring knowledge of an advanced type in a field of science or learning. The regulatory scheme emphasizes actual performance rather than formal title and training. For example, the term "Learned Professions" is defined in 29 C.F.R. § 541.302(f), which explains that regardless of whether an employee's title is "Junior Accountant" or "Senior Accountant" an employee is not exempt who normally performs a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do.

However, the district court disregarded this regulatory emphasis on the work performed and focused instead on degrees and titles. Relying solely on the facts that petitioner graduated with a Bachelor's degree in chemistry and belonged to professional societies and that his job description required a Master of Science or Bachelor of Science degree with three years experience as a Research Associate, the district court determined that petitioner was working in a "learned profession". Appendix at 6. Citing 29 C.F.R. § 541.302(b), the court determined that the requirement that an employee have knowledge of an advanced type for the purposes of identifying professional status was met by knowledge which could not be obtained in high school. The court disregarded the regulatory provisions concerning scientific professions. The regulations point out that in certain professional fields *including chemistry* an advanced academic degree is a standard prerequisite. 29 C.F.R. § 541.302(e)(1). Thus the court's determination that petitioner's bachelor's degree was an indicium of professional status and therefore the basis of a *prima facie* case was based on legal error.

Similarly, under 29 C.F.R. § 541.315(a) an employee's primary duties must include the consistent exercise of discretion and judgment as well as requiring knowledge of an advanced type in a field of science.[2] The district court found that petitioner made some scientific judgments when conducting experiments although the court also acknowledged that all experimental variables petitioner studied and the conditions under which they were run were set by petitioner's supervisor. The court omitted the term "consistent exercise of discretion and judgment" from his recitation of the elements of professional status and failed to recognize its significance. Appendix at 4. Thus, the court never addressed the issue of whether the restrictions imposed by the supervisor's instructions permitted petitioner a sufficient degree of discretion and judgment which could be found to be a *consistent* exercise under the regulations. Petitioner's work, like that of the accountant described in 29 C.F.R. § 541.302(f), was primarily routinized and non-discretionary.

The regulations promulgated by the Department of Labor pursuant to statutory authority have the force of law. *Atwood's Transportation Line, Inc. v. U.S.*, 211 F.Supp. 168, affirmed 83 S.Ct. 1312, 373 U.S. 377, 10 L.Ed.2d 420 (1962). In determining a status defined by regulation, the district court may not adopt only some criteria set by regulation and ignore others.[3] Rather, the court must effectuate the regulatory scheme by applying all of the standards created by regulation.

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2. As set forth in 29 C.F.R. § 541.315:

> [T]he requirements for exemption . . . will be deemed met by an employee who receives the higher salary or fees and whose *primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning . . . which includes work requiring the consistent exercise of discretion and judgment*. . . . (emphasis added).

3. The criteria set forth in the regulations are part of the substantive law and facts relevant to the application of the those criteria are material for the purposes of summary judgment. *Anderson v. Liberty Lobby, Inc.*, _____U. S. _____106 S. Ct. 2505, 2510 (1986). In the case, *sub judice*, the trial court ignored key elements in the regulatory definition of "professional" and therefore failed to consider certain material facts in its decision on the motion.

This significant issue of whether a court is bound by the regulatory interpretation of statutory provision justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully Submitted:

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June 25, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1392

MOLINARI, ALBERT J.,
v.
MCNEIL PHARMACEUTICAL

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil 84-5085
District Judge: Honorable Louis H. Pollak

Submitted Under Third Circuit Rule 12(6) January 21, 1987
Before GIBBONS, *Chief Judge*,
WEIS and HUNTER, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

JAMES HUNTER, III, *Circuit Judge*

Attest:

Clerk

Dated: JANUARY 30, 1987

FILED MAY 22, 1986

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT J. MOLINARI CIVIL ACTION

v.

MCNEIL PHARMACEUTICAL No. 84-5085

MEMORANDUM

POLLAK, J. MAY 21, 1986

Plaintiff was fired by defendant on April 19, 1983, after almost twelve years of employment in chemical research. He invokes this court's jurisdiction under the Fair Labor Standards Act (F.L.S.A.), 29 U.S.C. § 216(b), alleging that he was not paid overtime for work done in the two years prior to his dismissal, and invokes pendent jurisdiction over a state law claim that he was fired unjustly. Defendant has moved for summary judgment, and plaintiff has responded in opposition.

Factual Background

The basic facts surrounding plaintiff's employment, contained in ¶¶ 2-6 and ¶¶ 8-9 of the complaint, are admitted by defendant to be true. Plaintiff began working for defendant on August 2, 1971, as a Research Assistant in the Chemical Division. On July 1, 1975, he was promoted to the position of Research Associate. On January 1, 1981, he was promoted to Senior Research Associate in Chemical and Pharmaceutical Development, a post which he held until he was fired. From the beginning of his career with defendant until 1979, plaintiff received positive job evaluations, and regular and merit salary increases in addition to the promotions described. From April 1, 1981 through April 19, 1983, plaintiff's work was supervised by

Dr. Cynthia A. Maryanoff. On November 23, 1982, Dr. Maryanoff warned plaintiff that a failure to improve his job performance could lead to the termination of his employment. On April 19, 1983, Dr. Maryanoff informed plaintiff that he was fired, effective that day.

Plaintiff makes additional allegations in the complaint which defendant does not admit as true. He claims that Dr. Maryanoff "established productivity and work task directions which could be approached only . . . through the application of extensive overtime work on a regular daily, weekend and holiday basis." Complaint, ¶ 10. He claims that he worked overtime, and that under his contract with McNeil he should have been paid for this overtime work. ¶¶ 13-15, 24. He thus brings a federal claim under the F.L.S.A. to recover the unpaid overtime compensation.

Provisions of the F.L.S.A.

The essence of defendant's motion for summary judgment is that plaintiff's claim does not arise under the Act because plaintiff was a professional employee. Defendant concedes that under § 207(a)(1) of the Act, an employer is required to pay its employees at least time-and-a-half for their overtime work. Defendant notes, however, that according to § 213 (titled "Exemptions") the provisions of § 207 are not to be applied to those workers who are classified under the Act as "professionals." Section 213 reads in pertinent part:

> The provisions of sections 206 . . . and 207 of this title shall not apply with respect to—
> (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . .

29 U.S.C. § 213(a) (1985).

A motion for summary judgment may be properly granted only if the pleadings and other evidence show that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The burden on one who seeks summary judgment predicated on a claim of

exemption from F.L.S.A. coverage is peculiarly weighty. As the Third Circuit has stated:

> Exemptions from the FLSA are to be narrowly construed against the employer. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, 3 L.Ed.2d 815 (1959). The burden of proof is on the employer to establish an exemption. *See Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 86 S.Ct. 737, 15 L.Ed.2d 694 (1966).

Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141, 1143 (3d Cir. 1983).

The Professional Employee Exception

The regulations that implement § 213 provide two separate sets of criteria for determining whether a particular individual is employed as a professional. The first set of criteria appears as part of the General Regulations defining various terms used in the regulations, including the term "professional." *See* 29 C.F.R. 541.3(a) through (e). The second set of criteria appears at 29 C.F.R. § 541.315, and is designed to exempt high-salaried employees whose primary duties are related to a learned or artistic profession. If an employee qualifies as a professional under this subsection, then there is no need to refer to the lengthier first set. Thus, the set of criteria listed at § 541.315 is sometimes referred to as the "short test." *Cf. Guthrie*, 722 F.2d at 1143-44 (describing and applying analogous short test for executive employees).

A better name might be the "shorter test," however, as the test is hardly succinct. It reads, in pertinent part:

> the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning . . . Thus, the exemption will apply to

> highly paid employees employed either in one of the "learned" professions or in an "artistic" profession doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3(a) through (e).

The short test thus appears to require an inquiry whether (1) the employee's salary exceeds $250 per week; (2) the employee's profession is learned or artistic, and (3) the employee's primary duty requires advanced knowledge in a field of science or learning.

As to the first question, defendant has compiled annual and weekly salary figures for plaintiff from January 1979 through April 1983, the period for which overtime compensation is sought. These figures, which are based on figures provided by plaintiff at his deposition, show that plaintiff's weekly salary ranged from $394 in 1979 to $567 in 1983. Defendant's memorandum at 11. Plaintiff's earnings thus exceeded the minimum professional salary under the short test of $250 per week. Plaintiff does not challenge these figures. Defendant also states that plaintiff was compensated on an "annual salaried basis," and not according to a weekly or hourly rate. Defendant cites plaintiff's deposition testimony for support. Defendant's memorandum at 12. Plaintiff also does not challenge this contention. I conclude that plaintiff was a "high-salaried" employee under § 541.315.

The second step is to determine whether plaintiff was engaged in a "learned profession." These professions are defined in § 541.302 as:

> those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

29 C.F.R. § 541.302(a). The Code then breaks down this general definition into three elements. The first element is that the knowledge be of an advanced type, which means that "generally

speaking, it must be knowledge which cannot be attained at the high school level." § 541.302(b). The second element is that the knowledge be in a field of science or learning, as opposed to the mechanical arts. § 541.302(c). The third element is that the knowledge be "customarily acquired by a prolonged course of specialized intellectual instruction and study." The Code explains that the word "customarily" is not intended to exclude the "occasional chemist who is not the possessor of a degree in chemistry," but rather members of "such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal training." § 541.302(d). The Code then states that "[g]enerally speaking the professions which meet the [third] requirement . . . include . . . various types of physical, chemical, and biological sciences . . . ." § 541.302(e)(1).

These elements are clearly met in this case. According to defendant, plaintiff "graduated from Lehigh University in 1971 with a degree in chemistry," defendant's memorandum at 2, and was a member of various professional societies during his tenure with defendant, defendant's memorandum at 3. According to deposition testimony cited by defendant, the job description for plaintiff's position as Senior Research Associate stated as minimum qualifications an M.S. or B.S. with 3 years experience at the Research Associate level. Plaintiff does not contest these facts. I conclude that plaintiff was employed in a learned profession as defined in § 541.302.

The final determination to be made under the short test is whether plaintiff's "primary duty consist[ed] of the performance of work requiring knowledge of an advanced type in a field of science or learning." 29 C.F.R. § 315. Although the parties do not phrase their dispute in this way, the nub of it is whether plaintiff's "primary duty" under Dr. Maryanoff was one that required advanced knowledge. The section of the Code that covers the exemption for professional employees does not contain a specific definition of "primary duty"; instead, the reader is referred in § 541.304(a) to the definition of "primary duty" in the regulations governing the exemption for "executives" in § 541.103. The lengthy definition in this section requires

first that "[a] determination of whether an employee has management as his primary duty . . . be based on all the facts in a particular case." The section then explains that while employees who spend over 50% of their time on managerial duties would properly be held to be exempt, others who spend less than 50% of their time on managerial duties might also be exempt "If the other pertinent factors support such a conclusion." These factors include:

> the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor.

Id.

According to defendant, plaintiff was part of a research team that investigated and evaluated new syntheses for pharmaceutical products. Defendant quotes plaintiff's deposition testimony for the following description of his job under Dr. Maryanoff: " 'Chemical process improvement on clinical candidates with a minimum of laboratory supervision. Devising and evaluating new syntheses for novel investigational drugs.' Dep. p. 484 ln. 23 — p. 485 ln. 7, p. 487 ln. 4-7." Defendant's memorandum at 15. For an analysis of the types of activities plaintiff performed and the percentage of time he spent on these activities, defendant again cites to plaintiff's deposition testimony:

> Mr. Molinari explained that he should have spent 45-50% of his time on experimental activity, 15-20% of his time recording and summarizing raw data in his lab notebook, scientific meetings with supervisor 15%, and 15% of his time screening assigned journals, hygiene seminars, [sic] lab assignments and miscellaneous. Dep. p. 139 ln. 13-18, p. 140 ln. 7-16, p. 141 ln. 15-17.

Defendant's memorandum at 13.

Defendant then recounts at length three assignments which Plaintiff discussed in his deposition. Each of the assignments was given to him by Dr. Maryanoff, and each is said to be typical of his experimental laboratory work. The first experiment was to

conduct an esterification reaction, which involves transforming an organic acid into an organic ester. The second was an analysis of "the stability of the bromo ester anion and its susceptibility to dimerization . . . ." Plaintiff's dep. at 346, ln. 10-20, quoted at defendant's memorandum at 19. The third experiment involved the separation of substances by column chromatography.

In each case, defendant concedes that Dr. Maryanoff described for plaintiff at the outset of the experiment "the reactions he was to run and the conditions under which he was to run them." Defendant maintains, however, that its summaries of these experiments show that the performance of each experiment required "the consistent exercise of [plaintiff's] discretion and judgment." For example, in the esterification experiment, Dr. Maryanoff suggested plaintiff try five alternative esterification methods in attempting to reach the desired result. After trying two of these methods, neither of which was successful, plaintiff did some of his own library research, and concluded that a method not suggested by Dr. Maryanoff might in fact be best. He tried that method, and it was successful. Defendant notes that over the three days of experimentation, plaintiff made many scientific judgments, including: "method of esterification, equipment necessary, scale of the reaction, method to analyze the resulting product, length of time to let the reaction run, method to work up the reaction, and method to identify the resulting product." Defendant's memorandum at 19. According to defendant's summary of plaintiff's deposition testimony, plaintiff exercised similar judgment in the other two experiments that plaintiff described as typical. Defendant's memorandum at 20-22.

Plaintiff's position as expressed in his complaint is that Dr. Maryanoff, his supervisor, "established detailed direction over all essential aspects of the manner which plaintiff performed his work and Plaintiff was so restricted in the performance of his duties that he was not acting as a "professional" as defined by the Fair Labor Standards Act. . . ." Complaint, ¶ 12. In his memorandum, plaintiff claims to have raised a genuine issue of material fact as to whether he had any discretion to exercise professional judgment, or whether he exercised only "technical

competence" while under Dr. Maryanoff's supervision. His evidentiary support is his own testimony in deposition, part of which is quoted in plaintiff's response to defendant's motion, pp. 4-5. In this testimony, plaintiff merely states his view that, under Dr. Maryanoff, he exercised only technical judgment, and that Dr. Maryanoff made all of the decisions regarding important variables in the experiments, or which required professional judgment. Plaintiff's response, at pp. 4-5. Plaintiff does not supplement his testimony with any illustration or example. He recognizes that the only basis for his position that he is not a professional under the F.L.S.A. is his own view that Dr. Maryanoff extensively supervised him; he argues, however, that this is sufficient to withstand summary judgment because "it is very possible that the jury just might believe [me]. . . ." Plaintiff's memorandum at 3.

Plaintiff does not explain, however, what evidence or analysis he will present to the jury to support his assertion that he was not a professional. Plaintiff does not contest the evidence submitted by defendant that establishes that plaintiff was fully qualified to perform professional work, and he does not even address defendant's analysis of his testimony about three experiments typical of his lab work under Dr. Maryanoff.

As stated earlier, the burden of proof to establish an exemption is on the employer, and exemptions to the F.L.S.A. are to be construed narrowly. *Guthrie*, 722 F.2d at 1143. Even in this context, however, plaintiff's assertion that he did not perform professional work, without more, is not sufficient to withstand a motion for summary judgment. Plaintiff has shown no evidence, and offered no analysis or illustrations, on which a jury could base a conclusion that his experimental laboratory work was not the work of a professional. This lab work comprised, according to plaintiff's deposition testimony, 45%-50% of his time; furthermore, he spent a significant portion of his remaining time on such professional activities as screening scientific journals and recording and summarizing his raw data.

Although it may be true that plaintiff was not performing the kind of independent and original research of which he is capable, the scope of the professional exemption under the

F.L.S.A. is not limited only to the most senior or independent members of a profession. The regulations require only that plaintiff's primary duty consist "of the performance of work requiring knowledge of an advanced type in a field of science or learning," a standard which plaintiff has been shown to meet in this case.[1] I conclude that plaintiff was a professional employee as defined by the short test of 29 C.F.R. § 541.315, and therefore exempt from the overtime provisions of the Act under 29 U.S.C. § 213(a).

Accordingly, I will enter an order granting summary judgment for defendant on plaintiff's federal claim. As there appears to be no basis for diversity jurisdiction, I will also dismiss plaintiff's state law claims. An appropriate Order is attached.

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1. It is interesting in this regard to note an example of the difference between exempt and non-exempt professionals that appears in the general regulations defining professional. In § 541.306, the Code explains the meaning of one of the requirements of professional employment as defined in § 541.3, that "the employee be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work." To explain the meaning, the code first notes that the outwardly routine nature of a doctor's or chemist's work can be misleading. "While a doctor may make 20 physical examinations in the morning and perform in the course of his examinations essentially similar tests. . . . [this] requires not only judgment and discretion on his part but a continual variety of interpretation of the tests to perform satisfactory work. Likewise, although a professional chemist may make a series of similar tests, the problems presented will vary as will the deductions to made therefrom. The work of the true professional is inherently varied even though similar outward actions may be performed." The Code then contrasts the work of a "professional medical technologist" with that of a non-professional "laboratory assistant." "[T]he professional medical technologist . . . performs complicated chemical, microscopic, and bacteriological tests and procedures. . . . He will also . . . do research on new drugs, or on the improvement of laboratory techniques. . . . The simple, routine, and preliminary tests are generally performed by laboratory assistants or technicians." Because I conclude that plaintiff fits the standards of "professional" embodied in the short test, I do not need to evaluate his employment under the longer set of criteria from which the example is drawn. These illustrations are nevertheless appropriate to note, however, since it would be anomalous if plaintiff were to be classified as a professional under the short test but not under the longer test, which is intended to comprehend a broader class of employees. There appears to be no such anomaly in this case.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT J. MOLINARI — CIVIL ACTION

v.

MCNEIL PHARMACEUTICAL — No. 84-5085

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby ORDERED that defendant's motion for summary judgment against plaintiff's federal claim is GRANTED, and judgment is ENTERED in favor of defendant on that claim. It is further ORDERED that plaintiff's remaining state law claims are DISMISSED for lack of jurisdiction over the subject matter.

_____

POLLAK, J.

MAY , 1986